

BEFORE THE
RESPIRATORY CARE BOARD
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

ROXANNE RENEE FORTNER,

Applicant/Respondent.

Case No. S-384

OAH No. L2007060939

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on August 3, 2007, at Los Angeles, California.

Catherine E. Santillan, Senior Legal Analyst, represented Complainant.

Roxanne Renee Fortner (Respondent) represented herself.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FINDINGS OF FACT

1. Stephanie Nunez made the Statement of Issues in her official capacity as the Executive Officer of the Respiratory Care Board of California (Board).
2. Respondent filed her application, dated November 1, 2006, with the Board for licensure as a respiratory care practitioner. The application was denied and this hearing ensued.
3. On February 18, 2004, in the Superior Court of the State of California, Bakersfield Judicial District, County of Kern, case number BF105198A, Respondent was convicted on her plea of nolo contendere to one count of violating Health and Safety Code section 11377, subdivision (a), possession of a controlled substance (methamphetamine), a felony.

The court found Respondent to be eligible for treatment under the provisions of Penal Code section 1210.1, subdivision (a).¹ Imposition of sentence was suspended and Respondent was placed on formal probation for a period of three years on condition, among

¹ This is part of the Substance Abuse and Crime Prevention Act of 2000 (the Act), commonly known as "Proposition 36."

other things, that she complete a drug treatment program, register as a narcotics offender, and pay fines, fees and restitution totaling \$610.

On March 3, 2005, Respondent submitted proof that she had completed the drug treatment program. On March 24, 2005, the court issued an order under the provisions of Penal Code section 1210.1 that terminated Respondent's probation, reduced the felony conviction to a misdemeanor under the provisions of Penal Code section 17, set aside the nolo contendere plea, entered a plea of not guilty, and dismissed the count.

The facts and circumstances of the above crime were that Respondent was inside a residence (not her own) when the Kern County Narcotic Enforcement Team entered and conducted a search. The arresting officer determined that Respondent gave the appearance of someone under the influence of a central nervous system stimulant. Respondent's purse was searched and Respondent was found to be in possession of two bindles of methamphetamine² weighing approximately .90 grams.

4. On December 19, 2001, in the Sevier County Justice Court, State of Utah, case number Y112749, Respondent was convicted on her plea of guilty to one count of violating the Utah Controlled Substances Act, Title 58, Chapter 37, section 8, subdivision (2)(ii), permitting the unlawful possession of a controlled substance (marijuana) in a vehicle.³

Respondent was fined \$300 payable in three monthly installments of \$100. Respondent never paid the fine and on March 27, 2003, the court marked the matter "closed because def cannot be located, but may be reopened upon locating defendant."

The facts and circumstances of this crime were that Respondent and a friend were driving through Utah in a rented U-Haul vehicle when they were stopped by the Sevier County Sheriff for speeding (Respondent was driving). The arresting officer smelled "burnt marijuana" and received permission to search the vehicle. He found a box with two glass pipes and "a green leafy substance" in it. Respondent voluntarily gave a urine sample which tested "positive for THC."⁴

² Methamphetamine is a highly addictive central nervous system stimulant that can be injected, snorted, smoked, or ingested orally. Methamphetamine users feel a short yet intense "rush" when the drug is initially administered. The immediate effects of methamphetamine include increased activity and decreased appetite. The drug has limited medical uses for the treatment of narcolepsy, attention deficit disorders, and obesity. Because it has some limited medical use, methamphetamine is considered a Schedule II drug under Title 21 U.S.C 812 and Health and Safety Code section 11055, subdivision (d)(2).

³ The Utah statute provides as follows: "(a) It is unlawful . . . (ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations."

⁴ The psychoactive ingredient in marijuana is Delta-9-Tetrahydrocannabinol, commonly referred to as THC.

5. On January 19, 2000, in the Superior Court of the State of California, County of Kern, case number BM583145A, Respondent was convicted on her plea of nolo contendere to one count of violating Penal Code section 273.5, subdivision (a), willful injury to a cohabitant, a misdemeanor.⁵

Imposition of sentence was suspended and Respondent was placed on summary probation for a period of three years on condition that she enroll in and complete a counseling program.⁶ Respondent was also sentenced to serve two days in custody with credit for two days served.

Respondent was required to enroll in the counseling program by January 22, 2000. She failed to do so and, after three separate bench warrants were issued for her arrest, on June 28, 2002, the court revoked her probation. On July 11, 2002, the court reinstated her probation finding that Respondent was “in compliance with the terms of her probation.” The court did not indicate whether that meant Respondent had completed her counseling or was still participating in counseling. Although the Statement of Issues alleges that Respondent completed her probation on July 11, 2003, there are no entries in the court docket after July 11, 2002 to confirm that allegation.

The facts and circumstances of the crime were not established with particularity as Respondent gave only a vague description of what had occurred, and the police report contained little direct evidence admissible under the holding in *Lake v. Reed* (1997) 16 Cal.4th 448. However, Respondent did admit there was an altercation and that she had been drinking at the time. Direct evidence contained in the police report confirmed that Respondent had a strong odor of an alcoholic beverage and that her eyes were bloodshot and her speech slurred. There was also direct evidence of the injuries sustained by the victim, including several scratches on his chest, a swollen right eye, and a bite mark on his back.

6. Prior to her 2004 conviction, Respondent had used methamphetamine for 11 years. She was involved with a group of “friends” who were drug users and it appeared her whole life revolved around drug usage. The 2004 conviction literally had a sobering effect on Respondent. She completed a 15 month sobriety program in 2005. In that program she attended four Narcotics Anonymous meetings weekly. She was subject to numerous random drug tests and did not fail any of them. Respondent also had six months of drug counseling and six months of “after care.” She has been drug-free for the past three and one-half years.

⁵ Penal Code section 273.5, subdivision (a) provides, “Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.” Although this crime is defined by statute as a felony, it was charged as a misdemeanor.

⁶ The court docket (Exhibit 9) did not reference a specific counseling program which Respondent was ordered to attend, although one docket entry (not the sentencing entry) made reference to “family violence” counseling. Respondent testified that she enrolled in and completed a 52-week “anger management” program as part of her probation in this matter.

7. Respondent has made every effort to remove herself from her old lifestyle. She no longer associates with her former “friends” or with any drug-users. In fact, she physically distanced herself from them by moving “out of the Bakersfield drug-use area.” To better herself, and because “ever since she was little [she] wanted to help people,” Respondent completed the class work necessary to be eligible for, and pass, the licensure examination to become a certified respiratory therapist. She passed that examination in January 2007. Respondent has also completed the educational requirements to become a registered respiratory therapist, but has not yet sat for the examination for that advanced license. Respondent did very well in her respiratory care classes and was named to the Dean’s List for three consecutive quarters, despite losing her grandmother, with whom she was very close, and having a child, all while attending these classes.

8. Respondent has been in a stable relationship for the past 18 months. Respondent has three children; her oldest child, now 13, currently lives with the child’s father; her two younger children are currently living with Respondent’s mother, and Respondent gives her mother the child support payments she receives for her children. Respondent was extremely candid about the reasons for her children’s current living arrangements, even though it was not brought up in the Statement of Issues. Apparently, her youngest child, seven months old at the time, suffered a fall in February of this year. Although the child did not show any signs of injury, such as dizziness, or loss of appetite, Respondent discovered the child had a hematoma on his skull when she was washing his hair. She immediately took him to the emergency room where the child was diagnosed as having a skull fracture. As a “mandated reporter,” the hospital notified the local children’s protective agency, who thereafter removed Respondent’s three children from her home. Respondent was ordered to take “parenting and family matters classes,” which she is due to complete by October 10, at which time all three of her children will be returned to her. No criminal charges were filed as a result of this incident.

9. Until recently, Respondent had always acted as a homemaker while the father of her children was the bread winner. After the incident describe in Finding 8, and even though she had not worked outside the home for at least seven years, Respondent obtained a job with Home Depot. She has been steadily employed there for several months. She recently received a “superior customer service” award from her employer for “being alert, focused and dedicated.” Respondent offered numerous letters of reference from friends, family, classmates and even one from the Program Director for the Advanced Respiratory Care Program Respondent attended. Each letter stressed Respondent’s positive attitude, her ability to deal with high stress situations, and her desire to help others. Those who knew Respondent best, including knowledge of her criminal past, were uniform in praising Respondent’s ability to “turn her life around” and to maintain her focus on bettering herself.

10. At the hearing of this matter, Respondent was highly respectful of the Board and of these proceedings. She was very emotional, disclosing that she had been abused while she was a child. She was passionate in her expressed desire to become a licensed respiratory care therapist. Respondent was also brutally honest about the mess she had made of her life,

noting that she could not refrain from “opening doors [to a better life] because [she] was afraid of the past.” Respondent also noted that she knew the Board could not simply take her word that she has been rehabilitated, and was quite willing to adhere to any conditions the Board would require in the event it issued the applied-for license.

11. No Findings are made with respect to the legal and investigative costs the Board has incurred in connection with this matter. As more fully explained below, costs are recoverable in disciplinary proceedings only, and this matter is not a disciplinary proceeding.

* * * * *

CONCLUSIONS OF LAW

Applicable Statutes and Regulations

1. Business and Professions Code section 3750 provides, in pertinent part:

The board may order the denial, suspension, or revocation of, or the imposition of probationary conditions upon, a license issued under this chapter, for any of the following causes:

[¶] . . . [¶]

(d) Conviction of a crime that substantially relates to the qualifications, functions, or duties of a respiratory care practitioner. The record of conviction or a certified copy thereof shall be conclusive evidence of the conviction.

[¶] . . . [¶]

(g) Conviction of a violation of any of the provisions of this chapter or of any provision of Division 2 (commencing with Section 500), or violating, or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or term of this chapter or of any provision of Division 2 (commencing with Section 500).

2. Business and Professions Code section 3750.5 provides, in pertinent part:

In addition to any other grounds specified in this chapter, the board may deny, suspend, or revoke the license of any applicant or licenseholder who has done any of the following:

(a) Obtained or possessed in violation of law, or except as directed by a licensed physician and surgeon, dentist, or podiatrist administered to himself or herself, or furnished or administered to another, any controlled substances

as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as defined in Article 2 (commencing with Section 4015) of Chapter 9.

(b) Used any controlled substance as defined in Division 10 (commencing with Section 11000) of the Health and Safety Code, or any dangerous drug as defined in Article 2 (commencing with Section 4015) of Chapter 9.

[¶] . . . [¶]

(d) Been convicted of a criminal offense involving the consumption or self-administration of any of the substances described in subdivisions (a) and (b), or the possession of, or falsification of a record pertaining to, the substances described in subdivision (a), in which event the record of the conviction is conclusive evidence thereof.

(e) Been committed or confined by a court of competent jurisdiction for intemperate use of or addiction to the use of any of the substances described in subdivisions (a), (b), and (c), in which event the court order of commitment or confinement is prima facie evidence of that commitment or confinement.

3. Business and Professions Code section 3752 provides:

A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of any offense which substantially relates to the qualifications, functions, or duties of a respiratory care practitioner is deemed to be a conviction within the meaning of this article. The board shall order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under Section 1203.4 of the Penal Code allowing the person to withdraw his or her plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

4. Business and Professions Code section 3752.5 provides: “For purposes of Division 1.5 (commencing with Section 475), and this chapter, a crime involving bodily injury or attempted bodily injury shall be considered a crime substantially related to the qualifications, functions, or duties of a respiratory care practitioner.”

5. California Code of Regulations, title 16, section 1399.370 provides, in pertinent part:

For the purposes of denial, suspension, or revocation of a license, a crime or act shall be considered to be substantially related to the qualifications,

functions or duties of a respiratory care practitioner, if it evidences present or potential unfitness of a licensee to perform the functions authorized by his or her license or in a manner inconsistent with the public health, safety, or welfare. Such crimes or acts include but are not limited to those involving the following:

(a) Violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of or conspiring to violate any provision or term of the Act.

6. Business and Professions Code section 492 provides:

Notwithstanding any other provision of law, successful completion of any diversion program under the Penal Code, or successful completion of an alcohol and drug problem assessment program under Article 5 (commencing with Section 23249.50) of Chapter 12 of Division 11 of the Vehicle Code, shall not prohibit any agency established under Division 2 (commencing with Section 500) of this code, or any initiative act referred to in that division, from taking disciplinary action against a licensee or from denying a license for professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest.

7. Penal Code section 1201.1 provides, in pertinent part:

(a) Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. The court shall impose appropriate drug testing as a condition of probation. The court may also impose, as a condition of probation, participation in vocational training, family counseling, literacy training and/or community service. A court may not impose incarceration as an additional condition of probation. Aside from the limitations imposed in this subdivision, the trial court is not otherwise limited in the type of probation conditions it may impose. Probation shall be imposed by suspending the imposition of sentence. No person shall be denied the opportunity to benefit from the provisions of the Substance Abuse and Crime Prevention Act of 2000 based solely upon evidence of a co-occurring psychiatric or developmental disorder. To the greatest extent possible, any person who is convicted of, and placed on probation pursuant to this section for a nonviolent drug possession offense shall be monitored by the court through the use of a dedicated court calendar and the incorporation of a collaborative court model of oversight that includes close collaboration with treatment providers and probation, drug testing commensurate with treatment needs, and supervision of progress through review hearings.

[¶] . . . [¶]

(e) (1) At any time after completion of drug treatment and the terms of probation, the court shall conduct a hearing, and if the court finds that the defendant successfully completed drug treatment, and substantially complied with the conditions of probation, including refraining from the use of drugs after the completion of treatment, the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant. In addition, except as provided in paragraphs (2) and (3), both the arrest and the conviction shall be deemed never to have occurred. The defendant may additionally petition the court for a dismissal of charges at any time after completion of the prescribed course of drug treatment. Except as provided in paragraph (2) or (3), the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.

(2) Dismissal of an indictment, complaint, or information pursuant to paragraph (1) does not permit a person to own, possess, or have in his or her custody or control any firearm capable of being concealed upon the person or prevent his or her conviction under Section 12021.

(3) Except as provided below, after an indictment, complaint, or information is dismissed pursuant to paragraph (1), the defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or convicted for the offense. Except as provided below, a record pertaining to an arrest or conviction resulting in successful completion of a drug treatment program under this section may not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

Regardless of his or her successful completion of drug treatment, the arrest and conviction on which the probation was based may be recorded by the Department of Justice and disclosed in response to any peace officer application request or any law enforcement inquiry. Dismissal of an information, complaint, or indictment under this section does not relieve a defendant of the obligation to disclose the arrest and conviction in response to any direct question contained in any questionnaire or application for public office, for a position as a peace officer as defined in Section 830, for licensure by any state or local agency, for contracting with the California State Lottery, or for purposes of serving on a jury.

8. Business and Professions Code section 3753.5, subdivision (a) provides:

(a) In any order issued in resolution of a *disciplinary proceeding* before the board, the board or the administrative law judge may direct any practitioner or applicant found to have committed a violation or violations of law to pay to the board a sum not to exceed the costs of the investigation and prosecution of the case. A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the official custodian of the record or his or her designated representative shall be prima facie evidence of the actual costs of the investigation and prosecution of the case. (Emphasis added.)

9. Government Code section 11503 provides, “A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation.” Government Code section 11504 provides, “A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues.”

Legal Conclusions

10. The standard of proof in this proceeding is “preponderance of the evidence,” meaning that respondent is obliged to adduce evidence that has more convincing force than that opposed to it. The administrative law judge applies this standard of proof because respondent is applying for a license in which she currently holds no vested interest. (*San Benito Foods v. Veneman* (1996) 50 Cal.App.4th 1889, 1893.)

11. Respondent’s application is subject to denial under the provisions of Business and Professions Code sections 3750, subdivision (d) and (g), 3752, and California Code of Regulations, title 16, section 1399.370, subdivision (a), by reason of the convictions set forth in Findings 3 and 4. Whether the application is subject to denial under these provisions of law, based upon the conviction set forth in Finding 3, is more fully discussed below.

12. Respondent’s use and possession of methamphetamine, as set forth in Finding 3, and her use and possession of marijuana, as set forth in Finding 4, are grounds for denial of her application under the provisions of Business and Professions Code section 3750.5, subdivisions (a) and (b) and (d). However, Respondent was not “committed or confined,” within the meaning of Business and Professions Code section 3750.5, subdivision (e), for purpose of license denial, by reason of Finding 3.

13. Respondent’s conviction for battery on a cohabitant, as set forth in Finding 5, provides grounds for license denial under the provisions of Business and Professions 3752.5, subdivision (a), as it is a crime involving the infliction of bodily injury, and it is also a crime involving moral turpitude. Although not amenable to a precise definition, “moral turpitude” connotes a readiness to do evil, an act of baseness, vileness or “depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1757, quoting from *People v. Mansfield* (1988) 200 Cal.App.3d

82, 87.) The court in *People v. Rodriguez*, (1992) 5 Cal.App.4th 1398, 1402, found that a violation of Penal Code section 273.5 (willful infliction of corporal injury on spouse) involves moral turpitude for purposes of using the prior felony conviction for impeachment in a criminal case. The court explained:

To violate Penal Code section 273.5 the assailant must, at the very least, have set out, successfully, to injure a person of the opposite sex in a special relationship for which society rationally demands, and the victim may reasonably expect, stability and safety, and in which the victim, for these reasons among others, may be especially vulnerable. To have joined in, and thus necessarily to be aware of, that special relationship, and then to violate it wilfully and with intent to injure, necessarily connotes the general readiness to do evil that has been held to define moral turpitude.

14. The next issue that must be decided is whether Respondent's 2004 conviction for possession of methamphetamine may form the basis for denial of her application. Under the provisions of Business and Professions Code section 492, the answer is "yes." Under the provisions of Penal Code section 1210.1, subdivision (e)(1), the answer appears to be "no."

15. It is a fundamental rule of statutory construction that the intent of the enacting authority should be determined so as to give effect to the purpose of the law. (*Chavez v. Civil Service Commission* (1978) 86 Cal. App. 3d 324 at 330.) If possible, effect should be given to the enacted provision as a whole so that no part of it will be useless or meaningless.

16. A statute must be construed in view of its general purpose, scope and object, so that mere literal construction of a provision will not prevail if it is opposed to the intention of the Legislature. A literal construction that will lead to absurd consequences should be avoided. (See generally 58 Cal. Jur. 3d, Section 99 at pages 466-7.)

17. Where a statute contains both general and special provisions, effect should be given to both if possible but, in the event of irreconcilable conflict, a general provision is ordinarily controlled by a special provision. (See, Code Civ. Proc. §1859. See also *In re Ricardo A.* (1995) 32 Cal. App. 4th 1190.)

18. The Legislature is deemed to be aware of statutes already in existence and to have those laws in mind at the time it enacts a new statute. See, *Schmidt v. Southern California Rapid Transit District* (1993) 14 Cal. App. 4th 23. See also *People v. McGuire* (1993) 14 Cal. App. 4th 687.

19. In determining legislative intent, one must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase, and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose. Statutes must be construed so as to give a reasonable and common sense construction that is consistent with the apparent

purpose and intention of the lawmakers, that is the practical rather than technical, and that leads to wise policy rather than mischief or absurdity. (*People v. Turner* (1993) 15 Cal. App. 4th 1690.)

20. The quest for legislative intent in statutory construction is not unbounded. There can be no intent in a statute not expressed in its words, and there could be no intent on the part of the framers of such a statute which does not find expression in their words. The meaning of a statute is to be sought in the language used by the Legislature. Words may not be inserted in a statute under the guise of interpretation. (*City of Sacramento v. Public Employee's Retirement System* (1994) 22 Cal. App. 4th 786.)

21. Wherever possible, potentially conflicting provisions should be reconciled in order to carry out the overriding legislative purpose as gleaned from a reading of the entire act. A construction that makes sense of an apparent inconsistency is to be preferred. (*Viking Insurance Co. v. State Farm Mut. Auto. Ins. Co.* (1993) 17 Cal. App. 4th 540.)

22. Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. (*Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal. 3d 584, 590.)

23. As the Supreme Court noted in *Meijia v. Reed* (2003) 31 Cal.4th 657 at 663:

Under well-established rules of statutory construction, we must ascertain the intent of the drafters so as to effectuate the purpose of the law. [Citation.] Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context.” (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203, 47 P.3d 1069].) “[E]very statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect.” (*Moore v. Panish* (1982) 32 Cal.3d 535, 541 [186 Cal. Rptr. 475, 652 P.2d 32].) “Where as here two codes are to be construed, they ‘must be regarded as blending into each other and forming a single statute.’ [Citation.] Accordingly, they ‘must be read together and so construed as to give effect, when possible, to all the provisions thereof.’ [Citation.]” (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 679 [131 Cal. Rptr. 789, 552 P.2d 749].)

When the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules or maxims of construction “which serve as aids in the sense that they express familiar insights about conventional language usage.” (2A Singer, *Statutes and Statutory Construction* (6th ed. 2000) p. 107.) Courts also look to the legislative history of the enactment. “Both the legislative history of the statute

and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.” (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) Finally, the court may consider the impact of an interpretation on public policy, for “[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.

24. In *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (1996) 43 Cal.App. 4th 1011, the court noted the California Supreme Court’s holding in *Rivera v. City of Fresno*, 6 Cal. 3d 132 (1971) at page 140:

The contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized.

25. Generally, the State of California prohibits the delegation of legislative power, particularly to a non-elected body. This doctrine rests upon the premises that (1) the legislative body (in this case the State Legislature) must resolve fundamental policy issues and not delegate that function; and (2) the power to change the law is necessarily legislative in character, and is vested exclusively in the Legislature and cannot be delegated by it. (*Simi Valley Recreation and Park District v. Local Agency Formation Com.* (1975) 51 Cal. App.3d 648, 669.) The doctrine which prohibits delegation of legislative power is not violated if the Legislature makes the fundamental policy decision and leaves to some other body, such as the Board, the task of achieving the goals envisioned in the legislation. (*Ibid* at page 670.) (See also *Kugler v. Yocum* (1968) 69 Cal. 2d 371.) Accordingly, once the Legislature has declared a policy and fixed a primary standard, it may confer upon executive or administrative officers (i.e. the Board) the power to “fill up the details” by prescribing administrative rules and regulations to promote the purposes of the legislation and carry it into effect. (*Simi, supra.*) (See also *First Industrial Loan Company v. Daugherty* (1945) 26 Cal.2d 545, 549.) When the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of the doctrine against delegation of legislative power (*Kugler, supra* at pages 375-377.)

26. Because legislative policy determinations cannot be delegated to a non-legislative board (See *Clean Air Constituency v. California State Air Resources Board*, (1974) 11 Cal.3d 801 and *San Francisco Fire Fighters v. City and County of San Francisco* (1974) 68 Cal.App.3d 899.), administrative regulations that alter or amend the statute or enlarge or impair its scope are void. (See *Rosas v. Montgomery* (1970) 10 Cal.App.3d 77. Even if the statute is construed as empowering the non-legislative body to exercise judgment of a high order in implementing the legislative policy, it does not have unrestricted powers. (*CEED v. California Coastal Zone Conservation Commission*, (1974) 43 Cal. App.3d 306, 327.) Accordingly, the law presumes stringent standards to contain and guide the exercise of the Board's rule making power. (*Allen v. California Board of Barber Examiners* (1972) 25 Cal.App.3d 1014, 1018)

27. The Board is presumed to exercise its power in conformity with the requirements of the law. If the Board acts unfairly, the law presumes the fault lies with it, and not the statute empowering it. Constitutional guarantees against arbitrary and discriminatory action are read into the law. (*Butterworth v. Boyd* (1938) 12 Cal.2d 140, 149.)

28. Accordingly, the Department may not ascribe a meaning to the statutes under which it operates that would expand its powers beyond that which the Legislature intended, nor may it create new law to replace existing law.

29. With the foregoing in mind, the statutes in question are next examined. The relevant code sections are set forth above in Conclusions 6 and 7. Under Penal Code section 1210.1, subdivision (e)(3) “a record pertaining to an arrest or conviction resulting in successful completion of a drug treatment program under this section may not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.” There is an exception to this provision, the “exception” being the fact that an applicant for a state license, such as the one at issue, must disclose that fact on the application, when asked to do so. Respondent was required to, and did, disclose her conviction on the pending application. The “exception” does not state that the conviction may form the basis for denial of a state license; it requires only that the conviction be disclosed.

30. Business and Professions Code section 492 appears to directly contradict the above quoted portion of the Penal Code by permitting the conviction to form the basis for license denial even though Respondent successfully completed the drug treatment program.

31. The Act (Proposition 36) was enacted in 2000 by a vote of the People of the State of California and was thereafter substantially amended by the Legislature in 2006. This law was enacted well after Business and Professions Code section 492 was enacted in 1987. What at first blush appears to be an irreconcilable difference in the two laws actually is not. Penal Code section 1210.1, which prohibits the denial of a license based on a conviction that was dismissed after successful completion of a drug diversion program, nevertheless requires disclosure of that conviction on a state professional license application. Business and Professions Code section 492, which provides that successful completion of a drug program does not preclude the Board from utilizing the record of arrest as the basis for license denial, also has an exception—for completion of a drug program set up under Division 2, commencing with section 500, of that Code. The fact that Penal Code section 1210.1 requires the drug related conviction to be disclosed on a state licensing application is not inconsistent with its provision that the conviction, once dismissed under that code section, cannot form the basis for license denial. The statutes, when read together and harmonized, require the conviction to be disclosed so that the licensing agency, in determining whether a license should be issued, may take into account a drug related conviction so that, assuming there is no other basis for license denial, it may place appropriate conditions on the license, such as mandatory drug testing and drug counseling, in order to ensure that the public interest will not be unduly put at risk by one of its licensees. Any other reading of the

statutes would render part of one or the other superfluous, a construction that is not to be condoned. In any event, the Board is not put at any disadvantage, as the fact that Respondent possessed and used the drug in question may, as noted in Conclusion 12, form a separate basis for license denial.

32. Having now determined that grounds do exist for denial of Respondent's application, the next determination that must be made is whether Respondent has been sufficiently rehabilitated from her past conduct so as to warrant issuance of the applied-for license.

33. Rehabilitation is evaluated on the basis of two different scales. One is an internal, attitudinal scale and the other is an external objective scale. In other words, Respondent must present evidence both of a state of mind and a state of facts showing she has been rehabilitated. The state of mind demonstrating rehabilitation is one that has a mature, measured appreciation of the gravity of the misconduct and remorse for the harm caused. To establish rehabilitation, Respondent must also show a demonstrated course of conduct that convinces and assures the Board that the public would be safe if Respondent is permitted to retain his license. Respondent must show a track record of reliable, responsible and consistently appropriate conduct.

34. In her testimony, Respondent did not attempt to palliate or vitiate her conduct. She accepted full responsibility and showed extreme remorse and regret. She also demonstrated that she has a track record of three and one-half years of sobriety, was an excellent student, is now in a stable family relationship and has made great strides in turning away from her former drug-infused lifestyle. She has been rehabilitated to the extent that it would not be adverse to the public interest to permit Respondent's licensure as a respiratory therapist, provided the license is conditioned as set forth below, by reason of Findings 6, 7, 8, 9 and 10.

35. The Board is not entitled to recover from Respondent any of the costs it incurred in connection with this proceeding. As noted above, the Board is entitled to cost recovery if it prevails in a **disciplinary** proceeding, a proceeding that is initiated by the filing of an Accusation under Government Code section 11503. This is not a disciplinary proceeding. This matter is to determine whether the privilege of licensure should be granted to Respondent, a proceeding that was initiated by the filing of a Statement of Issues. To hold otherwise would have an extreme chilling effect on potential licensees who would not file their application for licensure for fear that not only would the license not be granted, but they could be subjected to paying thousands of dollars in costs merely because they requested a hearing to establish that the license should be granted.

* * * * *

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The application of Respondent Roxanne Renee Fornter for licensure as a Respiratory Care Therapist is granted. Provided, however, that the license is immediately revoked and Respondent is placed on probation for a period of three years under the following terms and conditions.

1. **OBEY ALL LAWS** Respondent shall obey all laws, whether federal, state, or local. The Respondent shall also obey all regulations governing the practice of respiratory care in California.

Respondent shall notify the Board in writing within 14 days of any incident resulting in her arrest, or charges filed against, or a citation issued against, Respondent.

2. **QUARTERLY REPORTS** Respondent shall file quarterly reports of compliance under penalty of perjury, on forms to be provided, to the probation monitor assigned by the Board. Omission or falsification in any manner of any information on these reports shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

Quarterly report forms will be provided by the Board. Respondent is responsible for contacting the Board to obtain additional forms if needed. Quarterly reports are due for each year of probation and the entire length of probation as follows:

For the period covering January 1st through March 31st, reports are to be completed and submitted between April 1st and April 7th.

For the period covering April 1st through June 30th, reports are to be completed and submitted between July 1st and July 7th.

For the period covering July 1st through September 30th, reports are to be completed and submitted between October 1st and October 7th.

For the period covering October 1st through December 31st, reports are to be completed and submitted between January 1st and January 7th.

Failure to submit complete and timely reports shall constitute a violation of probation.

3. PROBATION MONITORING PROGRAM Respondent shall comply with requirements of the Board appointed probation monitoring program, and shall, upon reasonable request, report to or appear to a local venue as directed.

Respondent shall claim all certified mail issued by the Board, respond to all notices of reasonable requests timely, and submit Annual Reports, Identification Update reports or other reports similar in nature, as requested and directed by the Board or its representative.

Respondent is encouraged to contact the Board's Probation Program at any time he/she has a question or concern regarding her terms and conditions of probation.

Failure to appear for any scheduled meeting or examination, or cooperate with the requirements of the program, including timely submission of requested information, shall constitute a violation of probation and will result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

4. PROBATION MONITORING COSTS All costs incurred for probation monitoring during the entire probation shall be paid by the Respondent. The monthly cost may be adjusted as expenses are reduced or increased. Respondent's failure to comply with all terms and conditions may also cause this amount to be increased.

All payments for costs are to be sent directly to the Respiratory Care Board and must be received by the date(s) specified. (Periods of tolling will not toll the probation monitoring costs incurred.)

If Respondent is unable to submit costs for any month, he/she shall be required, instead to submit an explanation of why he/she is unable to submit the costs, and the date(s) he/she will be able to submit the costs including payment amount(s). Supporting documentation and evidence of why the Respondent is unable to make such payment(s) must accompany this submission.

Respondent understands that failure to submit costs timely is a violation of probation and submission of evidence demonstrating financial hardship does not preclude the Board from pursuing further disciplinary action. However, Respondent understands that by providing evidence and supporting documentation of financial hardship it may delay further disciplinary action.

In addition to any other disciplinary action taken by the Board, an unrestricted license will not be issued at the end of the probationary period and the respiratory care practitioner license will not be renewed, until such time all probation monitoring costs have been paid.

The filing of bankruptcy by the Respondent shall not relieve the Respondent of her responsibility to reimburse the Board for costs incurred.

5. **EMPLOYMENT REQUIREMENT** Respondent shall be employed a minimum of 24 hours per week as a respiratory care practitioner for a minimum of 2/3 of her probation period.

Respondent may substitute successful completion of a minimum of thirty (30) additional continuing education hours, beyond that which is required for license renewal, for each 8 months of employment required. Respondent shall submit proof to the Board of successful completion of all continuing education requirements. Respondent is responsible for paying all costs associated with fulfilling this term and condition of probation.

6. **NOTICE TO EMPLOYER** Respondent shall be required to inform her employer, and each subsequent employer during the probation period, of the discipline imposed by this decision by providing her supervisor and director and all subsequent supervisors and directors with a copy of the decision and order, and the Statement(s) of Issues or Accusation(s) in this matter prior to the beginning of or returning to employment or within 14 days from each change in a supervisor or director.

If Respondent is employed by or through a registry [and is not restricted from working for a registry], Respondent shall make each hospital or establishment to which he/she is sent aware of the discipline imposed by this decision by providing her direct supervisor and administrator at each hospital or establishment with a copy of this decision, and the Statement(s) of Issues or Accusation(s) in this matter prior to the beginning of employment. This must be done each time there is a change in supervisors or administrators.

The employer will then inform the Board, in writing, that he/she is aware of the discipline, on forms to be provided to the Respondent. Respondent is responsible for contacting the Board to obtain additional forms if needed. All reports completed by the employer must be submitted from the employer directly to the Board.

Respondent shall execute a release authorizing the Board or any of its representatives to review and obtain copies of all employment records and discuss and inquire of the probationary status with any of Respondent's supervisors or directors.

7. **CHANGES OF EMPLOYMENT OR RESIDENCE** Respondent shall notify the Board, and appointed probation monitor, in writing, of any and all changes of employment, location, and address within 14 days of such change. This includes but is not limited to applying for employment, termination or resignation from employment, change in employment status, change in supervisors, administrators or directors.

Respondent shall also notify her probation monitor AND the Board IN WRITING of any changes of residence or mailing address within 14 days. P.O. Boxes are accepted for mailing purposes, however the Respondent must also provide her physical residence address as well.

8. **TOLLING FOR OUT-OF-STATE RESIDENCE OR PRACTICE** Periods of residency or practice outside California, whether the periods of residency or practice are temporary or permanent, will toll the probation period but will not toll the cost recovery requirement, nor the probation monitoring costs incurred. Travel out of California for more than 30 days must be reported to the Board in writing prior to departure. Respondent shall notify the Board, in writing, within 14 days, upon her return to California and prior to the commencement of any employment where representation as a respiratory care practitioner is/was provided.

9. **VALID LICENSE STATUS** Respondent shall maintain a current, active and valid license for the length of the probation period. Failure to pay all fees and meet CE requirements prior to her license expiration date shall constitute a violation of probation.

10. **VIOLATION OF PROBATION** If Respondent violates any term of the probation in any respect, the Board, after giving Respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If a petition to revoke probation is filed against Respondent during probation, the Board shall have continuing jurisdiction and the period of probation shall be extended until the matter is final. No petition for modification of penalty shall be considered while there is an accusation or petition to revoke probation or other penalty pending against Respondent.

11. **COMPLETION OF PROBATION** Upon successful completion of probation, Respondent's license shall be fully restored.

12. **WORK SCHEDULES** Respondent shall be required to submit to the probation monitor work schedules on a weekly/monthly basis for the length of probation. Respondent shall ensure the Board has a copy of her/his current work schedule at all times for each place of employment.

Failure to submit current work schedules on a continuous basis, shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

14. **BIOLOGICAL FLUID TESTING** Respondent, at her expense, shall participate in random testing, including but not limited to biological fluid testing (i.e. urine, blood, saliva), breathalyzer, hair follicle testing, or any drug screening program approved by the Board. Test

costs range from \$21 to \$200 each. The length of time shall be for the entire probation period. The frequency and location of testing will be determined by the Board.

At all times Respondent shall fully cooperate with the Board or any of its representatives, and shall, when directed, appear for testing as requested and submit to such tests and samples for the detection of alcohol, narcotics, hypnotic, dangerous drugs or other controlled substances.

If Respondent is unable to provide a specimen in a reasonable amount of time from the request, while at the work site, Respondent understands that any Board representative may request from the supervisor, manager or director on duty to observe Respondent in a manner that does not interrupt or jeopardize patient care in any manner until such time Respondent provides a specimen acceptable to the Board.

Failure to submit to testing or appear as requested by any Board representative for testing, as directed shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

15. ABSTENTION FROM USE OF MOOD ALTERING SUBSTANCES Respondent shall completely abstain from the possession or use of alcohol, any and all other mood altering drugs, substances and their associated paraphernalia, except when the drugs are lawfully prescribed by a licensed practitioner as part of a documented medical treatment.

Respondent shall execute a release authorizing the release of pharmacy and prescribing records as well as physical and mental health medical records. Respondent shall also provide information of treating physicians, counselors or any other treating professional as requested by the Board.

Respondent shall ensure that he/she is not in the presence of or in the same physical location as individuals who are using illegal substances, even if Respondent is not personally ingesting the drug(s).

Any positive result that registers over the established laboratory cutoff level shall constitute a violation of probation and shall result in the filing of an accusation and/or a petition to revoke probation against Respondent's respiratory care practitioner license.

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Respondent also understands and agrees that any positive result that registers over the established laboratory cutoff level shall be reported to each of Respondent's employers.

Date:_____

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings